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IN THE

Supreme Court of the United States

October Term, 1969
No. 635

ELIZABETH ELAINE CRAIG, *et al.*,
Petitioner,

vs.

THE UNITED STATES OF AMERICA, *et. al.*,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered on June 24, 1969.

Opinions Below.

The opinion of the District Court for the Southern District of California is reported at 284 Fed. Supp. 697. The opinion of the Court of Appeals for the Ninth Circuit is reported at ..... F. 2d .....

Jurisdiction.

The Judgment of the Court of Appeals for the Ninth Circuit was made and entered on June 24, 1969 and a copy thereof is appended to this petition in the Appendix at pp. ..... to ..... The opinion of the District Court is appended to this petition in the Appendix at pp. .... to ..... The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254 (1).

Questions Presented.

In a suit under the Death of the High Seas Act, 46 U.S.C.A. Sections 761-768, which was based upon Admiralty law; the mother on her behalf and upon the behalf of her six surviving children sought recovery for damages, for the death of her husband in an airplane crash aboard the aircraft carrier U.S.S. CONSTELLATION. The action was timely filed within the two years required by 46 U.S.C.A. Section 763 against several named defendants and "Does I through X". When petitioner sought to serve Litton Systems, Inc., as Doe I after the running of the statute of limitations the District Court refused to allow the amendment: (1) to substitute Litton Systems, Inc., as Doe I; or (2) to allow the amendment adding Litton Systems, Inc., to relate back to the time of filing the action, or (3) to allow Litton Systems, Inc., to be brought in as a party after the running of the statute of limitations as a new party defendant.[1] The Court of Appeals affirmed and so the questions presented are:

1. Whether the use of a fictitiously named defendant in an Admiralty action where jurisdiction is not predicated upon diversity of citizenship is proper?

2. Whether the Federal Rules of Civil Procedure Rule 15(c) pre-empt an Admiralty Court from establishing rules of procedure to see that justice is done between the parties?

3. Must the Federal Rules of Civil Procedure be narrowly construed when a question is presented that is not covered nor contemplated by the rules?

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[1]It is of interest to note that Litton Systems, Inc. has been a party to companion litigation arising out of the accident brought by a seaman named Sevits [R. pp. 40 and 54] and is also attempting to be dismissed out and not defend on the merits.

Statutes, Federal Rules, and Regulations Involved.

The pertinent portions of 46 U.S.C.A. Sections 761-768 and Rule 15(c) of the Federal Rules of Civil Procedure are set forth in the Appendix at pp. ..... to .....

Statement.

This action arises from the death of a pilot in the crash of his aircraft aboard the U.S.S. CONSTELLATION off the coast of Okinawa on August 19, 1963 [R. pp. 4 and 5]. The complaint names as defendants the United States of America, Timken Roller Bearing Company, Aluminum Company of America, Bethlehem Steel Corporation, McKiernan-Terry Corporation, and Does I through X [R. p. 2]. The thrust of the complaint is for negligence on the part of the defendants in the manufacture of the arresting gear resulting in a defect proximately causing the crash of the aircraft [R. pp. 2 and 3-5].

In the body of the complaint there is an allegation in Paragraph number III [R. p. 3] as follows:

> "The true names and capacities, whether individual, corporate, associate or otherwise, of respondents Does I through X, are unknown to libellant, who therefore, sues said respondents by such fictitious names. Libellant is informed and believes and thereon alleges that each of the respondents, herein designated as a Doe is responsible in some manner for the events and happenings herein referred to and caused injuries and damages proximately thereby as hereinafter alleged."

There is in addition to the above allegation a charging clause specifically alleging that Does I through X did carelessly, and negligently construct, design, engineer, fabricate, manufacture, equip, supply and main-

tain the arresting gear assembly on board the U.S.S. CONSTELLATION [R. p. 5]. Libellant candidly alleged that she was in doubt as to which of the respondents was negligent and requested leave of Court to prove which one or ones were responsible at the time of trial [R. p. 5].

Jurisdiction in the Federal District Court was based upon the Death on the High Seas Act, Title 46 U.S.C.A. Sections 761 to 768 [R. p. 2] and the complaint was filed on August 16, 1965 within two years of the date of death [R. p. 2].

An alias citation was issued on February 24, 1966 and Litton Systems, Inc., was served as Doe I on February 28, 1966 [R. pp. 12 and 13]. Litton Systems, Inc., appeared specially and expected to the alias citation. The District Court requested that petitioner make a motion under Rule 15(c) to permit the naming of defendants by fictitious name; to permit the amendment to the libel by adding Litton Systems, Inc., as a party as of the date of service of the alias Summons; and to permit the adding of Litton Systems, Inc., as of the date of the motion. This motion was filed on November 16, 1966 [R. pp. 31 and 32] and was set for hearing on November 28, 1966. Exceptions were filed by Litton Systems, Inc., and the District Court entered its order denying petitioner the right to amend on May 31, 1967 which order was filed on June 2, 1967 [R. pp. 91 and 93].

The memorandum decision acknowledged that there was scant authority for the use of fictitiously named defendants in admiralty relying upon *Phillips v. U.S.*, N.D. Cal. 1955, 127 Fed. Supp. 912 and then went on to hold that Rule 15(c) of the Federal Rules of Civil

Procedure required a showing of notice of the institution of the action within the statutory period of a defendant [R. pp. 91-93]. Petitioner appealed to the United States Court of Appeals for the Ninth Circuit.

On appeal the Court of Appeals affirmed. The Court acknowledged that there was no provision in the Federal Statutes or Federal Rules of Civil Procedure authorizing or prohibiting the use of fictitious parties and indicated that at least in "diversity" cases (emphasis added) the Court had expressed disapproval citing *Tolefree v. Ritz,* 9 Cir., 382 F. 2d 566, 567 and *Sigurdson v. Del Guercio,* 9 Cir., 241 F. 2d 480. So far as admiralty rules and procedure are concerned the Court alluded to the traditional liberality and indicated that *Phillips v. United States,* N.D. Cal., 127 Fed. Supp. 912 permitted such a practice. Some doubt was expressed concerning the practice in admiralty by citing *California Stevedore & Ballast Co. v. Pan-Atlantic S.S. Corp.,* 9 Cir., 291 F. 2d 252, 253. This left the Court undecided as to whether such a practice in admiralty was or was not permissible.

The Court then went on to say that Rule 15(c) is the only rule that can be used in any case, whether civil or in admiralty; and, since no provision is made for fictitiously named defendants petitioner must come within a construction of the provisions of Rule 15(c) to bring in any additional parties. Under the facts as viewed by the Court Litton Systems, Inc., had no notice of the action within the period of limitations and therefore could not be brought into the case after the expiration of the statutory period, pursuant to the rule and language contained in arabic numeral one of Rule 15(c).

REASONS FOR GRANTING THE WRIT.

The decision below should be reviewed because it encroaches upon the power of an Admiralty Court to regulate proceedings in order to administer substantial justice between the parties. At the present time an admiralty claimant is urged to forum shop within the Federal District Courts to find a Court that is favorable to his position. Had petitioner herein filed her action in the Northern District of California where the *Phillips* case cited *supra* was decided, fictitiously named defendants could be sued and brought into the case under the running of the statute of limitations and Litton Systems, Inc., would now be a defendant. The prior body of admiralty law as layed down by admiralty courts will be emasculated and it is necessary to have the question settled as to whether or not admiralty rules are still in addition to the Federal Rules of Civil Procedure, especially the body of judge made law that has existed for many years in this area.

It is admitted by the District Court and the Circuit Court that there is no provision in the Federal Rules of Civil Procedure that permit or exclude the use of fictitiously named defendants. They also admit that such a practice is permitted in admiralty by the *Phillips* case cited *supra*. The Circuit Court erroneously takes the position that they have expressed some doubt as to this practice in the *California Stevedore* case cited *supra*. This opinion clearly holds that when fictitious named defendants are dismissed in admiralty the action may be re-instated after the running of the statute of limitations, this is contrary to the opinion in the Circuit Court below.

It should be decided once and for all whether or not fictitiously named defendants may be sued in admiralty matters. If they cannot then a decision so stating should be handed down and this petition will provide a settlement of the question. If they can then amendments to show the true names when ascertained should be allowed.

Petitioner as the surviving widow of a deceased pilot who was killed aboard a first line fighting ship of the U.S. Navy cannot be required to *discover* (emphasis added) the names of all the manufacturers, and successors in interest thereto, of the vessel and its parts, within the statutory period of limitations. To so hold is a complete refusal to consider the practical aspects of litigation, especially one that could be as complicated as the present one. Under the decision of the Court below the statute of limitations is changed into a statute of discovery. If a defendant is not discovered within the limitation period he cannot be sued.

Petitioner's hands were tied by the Court's requirement that Rule 15(c) be adhered to in making her motion when it is obvious that the situation presented is not within the purview of the rule nor was it ever considered by the promulgators of the rule. The advisory committee never considered the use of a party by way of fictitious names when they set up the new requirements for Rule 15(c) in 1966. It is apparent that they were considering technical defenses in actions against the Secretary of Health, Education and Welfare in the notice requirements due to changes in the name of the Secretary. Rule 15(c) was forced upon petitioner as the only vehicle for amendment since no provision was made in the Rules for fictitiously named parties. Under

the construction of Rule 15(c) in order to bring in a new party it must be shown that he knew of the institution of the action against him. With the naming of a defendant fictitiously such a procedure would be impossible. No one could be shown to have notice of a law suit unless he was specifically named in it. Petitioner should not be forced into using a rule that it is impossible to comply with. The case at bench will result in a hardship because petitioner has been deprived of the liberality of admiralty and has been forced to accept an impossible position under a non-applicable rule.

Conclusion.

Petitioner recognizes that this Court is reluctant to enter into questions of procedure that they are best left to the Circuit Courts but it is submitted that the Federal Rules of Civil Procedure and the judge made Admiralty rules should be used for decisions on the merits and not on the basis of technicalities. One should not exclude the other. Rule 1 specifically provides that they are to be construed to secure the just, speedy, and inexpensive determination of every action. The application of a Federal Rule of Civil Procedure to an admiralty proposition has created a serious question to the validity of traditional admiralty concepts.

It is respectfully requested that this petition for a Writ of Certiorari be granted.

PETER J. HUGHES,
Counsel for Petitioner.

WALTER P. CHRISTENSEN,
Of Counsel.

APPENDIX.

Opinion of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit.

Elizabeth Elaine Craig, Administratrix of the Estate of Robert J. Craig, Appellant, v. The United States of America, Timken Roller Bearing Company, a corporation; Aluminum Company of America, a corporation; Bethlehem Steel Corporation, a corporation; McKiernan-Terry Corporation, a corporation; and Does I through X, Appellees. No. 22319.

Appeal from the United States District Court for the Southern District of California.

Before: HAMLEY and DUNIWAY, Circuit Judges, and BYRNE, District Judge*

HAMLEY, Circuit Judge:

Elizabeth Elaine Craig, Administratrix of the Estate of Robert J. Craig, filed this wrongful death action on August 16, 1965. She alleged that, on August 19, 1963, Robert J. Craig was killed on the high seas off Okinawa while attempting to land his military airplane on the aircraft carrier the U.S.S. CONSTELLATION. According to the complaint, the accident was caused by the negligence of the defendants resulting in defects in the arresting equipment of the vessel. District court jurisdiction was based on the Death on the High Seas Act, 46 U.S.C. §§ 761-768 (1964).

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*The Honorable William M. Byrne, Senior United States District Judge for the Central District of California, sitting by designation.

The defendants named in the complaint were the United States, Timken Roller Bearing Company, Aluminum Company of America, Bethlehem Steel Corporation, McKiernan-Terry Corporation, and "Does I through X." Plaintiff caused service of an alias citation and a copy of the complaint to be made upon Litton Systems, Inc. (Litton) as "Doe I," on February 28, 1966. Litton appeared specially, contending that the alias citation was issued prematurely and that Litton had not properly been brought before the court.

The court ordered plaintiff to serve and file a motion for leave to amend the complaint to place Litton before the court, postponing argument on Litton's exceptions until argument was had on the motion to amend. The motion was thereafter filed and served. Following argument on the motion and exceptions, the court denied plaintiff's motion to amend the complaint by naming Litton in substitution of "Doe I." Plaintiff appeals.

The limitations period for actions filed under the Death on the High Seas Act is two years from the date of the wrongful act. 46 U.S.C. § 763. Accordingly, the statute of limitations had run with regard to this action by August 19, 1965. As indicated above, the alias citation and a copy of the complaint were served upon Litton on February 23, 1966.

The district court held that the two-year statute of limitations bars plaintiff's claim against Litton unless, applying the principles stated in Rule 15(c), Federal Rules of Civil Procedure, the proposed amendment of the complaint, adding Litton as an additional party, relates back to the date of the original complaint. The district court further held that, applying those principles

to the circumstances of the case, plaintiff's proposed amended complaint did not relate back.

Plaintiff argues that, regardless of Rule 15(c), if an action is timely with respect to a fictitiously-named defendant, it is not barred as to an actual defendant named in lieu of the fictitious defendant in an amended complaint filed after the statute has run.

There is no provision in the federal statutes or Federal Rules of Civil Procedure either authorizing or expressly prohibiting the use of fictitious parties. However, this court has at least twice expressed disapproval of the practice. In *Tolefree v. Ritz,* 9 Cir., 382 F.2d 566, 567, a civil rights action, we held that it was proper to dismiss the action as to fictitious defendants. In *Sigurdson v. Del Guercio,* 9 Cir., 241 F.2d 480, an action for a declaratory judgment and to enjoin certain action by immigration officers, this court said:

> "These John Doe complaints are dangerous at any time. It is inviting disaster to allow them to be filed and to allow fictitious persons to remain defendants if the complaint is still of record. Appropriate action has been taken by the trial court on its own motion in some such cases. Although the fact that the Rules of Civil Procedure, 28 U.S.C.A., contain no express prohibition upon the subject, there is no authority of which we are aware for the joining of fictitious defendants in an action under a federal statute. These defendants should have been eliminated by motion of Del Guercio. . . ." (241 F.2d at 482, footnote omitted)[1]

[1]In diversity actions the difficulties encountered when fictitious parties are named have been dealt with a number of times.

(This footnote is continued on the next page)

This is an action in admiralty, and one district court has expressed approval of the practice of naming fictitious defendants in an admiralty suit, in view of the traditional liberality as to pleadings in admiralty. *Phillips v. United States,* N.D. Cal., 127 F.Supp. 912. On the other hand, this court has expressed doubt concerning the practice even in admiralty suits. See *California Stevedore & Ballast Co. v. Pan-Atlantic S.S. Corp.,* 91 F.2d 252, 253.

The only purpose the naming of fictitious defendants could possibly serve is to make it possible to substitute named defendants after the statute of limitations has run. But Rule 15(c), Federal Rules of Civil Procedure, provides the only way in which defendants, not accurately named in a pleading before the limitation period has run, may be accurately named afterwards. That rule, which pertains to the relation back of the pleadings, makes no mention of the pleading of fictitious parties. It is therefore wholly immaterial, insofar as the application of that rule is concerned, whether fictitious defendants were named prior to the running of the statute.[2]

See *Sykes v. United States,* 9 Cir., 290 F.2d 555, 556; *Grigg v. Southern Pacific Co.,* 9 Cir., 246 F.2d 613, 620; *Molnar v. N.B.C.,* 9 Cir., 231 F.2d 684, 687; *Roth v. Davis,* 9 Cir., 231 F.2d 681, 683.

[2]While there are some kinds of civil proceedings in which the Federal Rules of Civil Procedure do not apply, the rules do apply in suits in admiralty with exceptions not here relevant. See Rules 1 and 81(a)(1), Federal Rules of Civil Procedure, as amended in 1966.

This action was commenced on August 16, 1965, prior to the effective date of amended Rule 15 (c). The order of the Supreme Court, dated February 28, 1966, promulgating the 1966 amendments of the Federal Rules of Civil Procedure, provides that the amended rules shall govern all further proceedings in actions pending on the effective date of the amended rules ". . . except

It may be, although this is not entirely clear, that plaintiff is also arguing that under Rule 15(c) and apart from the naming of fictitious defendants in the original complaint, the amended complaint naming Litton for the first time relates back to the date of the original pleading.

Under Rule 15(c), an amended complaint "changing" the party against whom a claim is asserted relates back to the date of the original pleading only if all three of the following conditions are met: (1) the claim asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading; (2) within the period provided by law for commencing the action against him, the party to be brought in by amendment has received such "notice of the institution of the action" that he will not be prejudiced in maintaining his defense on the merits; and (3) within the period provided by law for commencing the action against him, the party to be brought in knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.[3]

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to the extent that in the opinion of the court their application in a particular action then pending would not be feasible or would work injustice, in which event the former procedure applies." The Supreme Court order is quoted in 28 U.S.C.A., Rules 59 to End, Cum.Ann. Pocket Part, page 231, following Rule 86. In our opinion, the application of the amended form of that rule is feasible and would not work an injustice in this case. Neither party here questions the applicability of Rule 15(c) as amended in 1966, and in fact, plaintiff relies upon the amended form of this rule in her argument on this appeal.

[3]For present purposes we assume, but we do not decide, that the naming of a new defendant in addition to and not in lieu

(This footnote is continued on the next page)

The district court held that Litton did not receive such notice of the institution of this action, prior to the running of the statute of limitations, as to enable it to maintain its defense without prejudice, and that therefore the second of the above-stated conditions of Rule 15(c) had not been met. On this ground, the court denied the motion to amend the complaint to name Litton as an additional party.

The facts concerning Litton's notice of the institution of this action are not in dispute. A seaman who was injured in the same accident in which pilot Craig was killed brought an action for damages within the statutory period against Litton and others in the United States District Court for the Southern District of New York. The action was entitled *Sevits v. McKiernan-Terry Corporation,* et al., 65 Civ. 1804. Prior to the running of the statute, Litton investigated the facts relevant to that lawsuit.

However, while the instant action, involving the death of a pilot in the same accident, was instituted prior to the running of the statute, there is nothing in the record to show that Litton knew or had reason to know of this lawsuit before the statutory period had run. The

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of another defendant misnamed in the original complaint, constitutes the "changing" of the party within the naming of Rule 15(c). Compare *United States v. Western Casualty & Surety Co.*, 6 Cir., 359 F.2d 521, 523; *Storey v. Garrett Corp.*, N.D. Cal., 43 F.R.D. 301, 304; and *King v. Udall*, D.D.C., 266 F.Supp. 747, 749; with *Williams v. United States*, 5 Cir., 405 F.2d 234, 237; *Travelers Insurance Co. v. Brown*, 5 Cir., 338 F.2d 229, 234; and *Meredith v. United Air Lines*, S.D. Cal., 41 F.R.D. 34, 39. See also, *Rural Fire Protection Co. v. Hepp*, 9 Cir., 366 F.2d 355, 362.

notes of the Advisory Committee following the 1966 amendment of Rule 15(c), state that notices of the institution of the action "need not be formal," but here Litton received no notice, formal and informal, of the institution of the action.

It follows that if the words of the second condition of Rule 15(c), "notice of the institution of the action," mean notice, within the statutory period, of the filing of the lawsuit, that condition was not fulfilled apart from the "prejudice" factor. It would also follow that the third condition was not fulfilled because that condition is also premised upon notice of the "action" prior to the running of the statute.

Plaintiff argues, in effect, however, that "action" as used in Rule 15(c) means incident giving rise to the action and that since Litton knew of the incident before the statute had run, the second and third conditions were fulfilled.

In our opinion, "action," as used in Rule 15(c), means a lawsuit, and not the incident giving rise to a lawsuit. The relevant words are "notice of the institution of the action." A lawsuit is instituted; an incident is not.

Moreover, even if the rule means notice of the incident rather than notice of the institution of the action, there was a failure to fulfill the futher requirement of the second condition that the notice be such that the new defendant "will not be prejudiced in maintaining his defense on the merits."

While Litton had, prior to the running of the statute, investigated the factual issues relevant to seaman Sevits' suit, it was not shown to have investigated additional factual issues relating primarily to the suit now before us. In our suit the decedent was the pilot of the airplane. He crashed into the sea while attempting to land on the aircraft carrier. Therefore, as to this suit, the facts pretaining to the pilot's acts and omissions at the time of the accident have a direct bearing upon the amount of recovery, whereas they may have only incidental relevance in seaman Sevits' suit.[4] Under these circumstances it cannot be said that notice of the incident, but not of the institution of this action, within the statutory period, did not prejudice Litton in maintaining its defense to the action.

We therefore hold that the district court did not err in denying the motion for leave to amend the complaint to add Litton as an additional defendant.

Affirmed.

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[4]Contributory negligence is an issue in a case based on the Death on the High Seas Act. While it does not bar recovery, the degree of negligence attributable to the decedent is to be taken into consideration in fixing the amount of recovery. See 46 U.S.C. § 766 (1964).

Memorandum of Decision Denying Libellant's Motion to Amend Her Complaint by Adding Litton Systems, Inc. as a Party Respondent.

United States District Court, Southern District of California.

Elizabeth Elane Craig, Administratrix of the Estate of Robert J. Craig, deceased, Libellant, vs. The United States of America; Timkin Rollerbearing Company, a corporation; Aluminum Company of America, a corporation; Bethlehem Steel Corporation, a corporation; McKiernan-Terry Corporation, a corporation; and Does I through X, Respondents. In Admiralty No. 3371-SD-C.

On August 16, 1965 Libellant filed her libel based on the Death on the High Seas Act, 46 U.S.C.A. 761-768. The caption named several respondents including Does I through X. The transaction giving rise to the libel occurred on August 19, 1963 on a certain aircraft carrier being operated on the high seas near the Island of Okinawa. Libellant's husband was killed when an airplane he was piloting crashed into the sea after an attempted landing on the aircraft carrier.

On November 16, 1966 Libellant filed a motion to add Litton Systems, Inc. as a respondent in the action as of February 28, 1966, the date Litton Systems, Inc. was served with a copy of the libel. The motion was made pursuant to Rule 15 of the Federal Rules of Civil Procedure.

Rule 15 provides, in part, in subsection (c): "An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him."

The statute of limitations for actions brought under the Death on the High Seas Act is two years. 46 U.S.C.A. 763. In this case, the statute began to run on August 19, 1963.

There are two questions presented on the motion:

(1) Whether the use of fictitious defendants is proper in admiralty.

(2) If the use of fictitious defendants is proper, may plaintiff amend her complaint to "add" Litton Systems, Inc. as a respondent in the action and have the amendment relate back to the date the complaint was filed under Rule 15 (c) of the Federal Rules of Civil Procedure?

Although there is no federal statute authorizing the use of fictitious "Doe" defendants in the federal court, there is some scant case authority supporting the propostion that the use of "Doe" defendants is proper in

admiralty. *Phillips v. U.S.*, 127 F.Supp. 912 (N.D. Cal. 1955).

However, in order to amend the complaint and have the amendment relate back to the time the complaint was filed thereby defeating the statute of limitations in 46 U.S.C.A. 763, the Libellant must satisfy the requirements of Rule 15(c), F.R.Civ.P. Specifically, Libellant must show that the party to be added in the action has "received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, . . ." Furthermore, the notice of the action must have been received by the party sought to be added, within the period provided by law for commencing the action against him. It has not been contended by Libellant that Litton Systems did receive such notice of the institution of the action.

However, Libellant has argued that the party sought to be brought in need only know of the "occurrence" which gave rise to the cause of action in order for the amendment to the libel to relate back to the time of filing under Rule 15(c), F.R.Civ.P. In support of that proposition, Libellant relies on four cases. *Kelcey v. Tankers Company,* 217 F.2d 541 (2d Cir. 1954); *Overfield v. Pennroad Corp.,* 39 F.Supp. 482 (E.D. Pa. 1941); *Taormina Corporation v. Escobedo,* 254 F.2d 171 (5th Cir. 1968); and *Hartford Accident and Indemnity Co. v. Interstate Equipment Corp.,* 81 F.Supp. 357 (D.C.N.J. 1948). None of these cases support Libellant's position. In *Kelcey* and *Overfield,* the

amendments brought in no new defendants. In *Taormina* and *Hartford Accident,* all defendants brought in by amendment had notice of the institution of the action within the period provided by law for commencing the action against them.

Assuming Litton Systems Inc. did know of the occurrence, it still had a right to rely on the two year statute of limitations in 46 U.S.C.A. 763. It is one thing to know of an occurrence which may give rise to a lawsuit, another to know you are being sued. Libellant has failed to carry its burden of showing that Litton Systems, Inc. had notice of the institution of the action within the period provided by law for commencing the action against it. Consequently, the motion seeking to add Litton Systems, Inc. as a respondent by amending the complaint must be denied.

SO ORDERED.

Jesse W. Curtis
Chief United States District Judge

Pertinent Portions of 46 U.S.C.A. Sections 761-768.

§ 761. Right of Action; Where and by Whom Brought.

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued. Mar. 30, 1920, c. 111, § 1, 41 Stat. 537.

§ 762. Amount and Apportionment of Recovery.

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought. Mar. 30, 1920, c. 111, § 2, 41 Stat. 537.

§ 763. Limitations.

Suit shall be begun within two years from the date of such wrongful act, neglect, or default, unless during that period there has not been reasonable opportunity for securing jurisdiction of the vessel, person, or corporation sought to be charged; but after the expiration of such period of two years the right of action hereby given shall not be deemed to have lapsed until ninety days after a reasonable opportunity to secure jurisdic-

tion has offered. Mar. 30, 1920, c. 111, § 3, 41 Stat. 537.

§ 764. Rights of Action Given by Laws of Foreign Countries.

Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding. Mar. 30, 1920, c. 111, § 4, 41 Stat. 537.

§ 765. Death of Plaintiff Pending Action.

If a person die as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this title during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this title. Mar. 30, 1920, c. 111, § 5, 41 Stat. 537.

§ 766. Contributory Negligence.

In suits under this chapter the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly. Mar. 30, 1920, c. 111, § 6, 41 Stat. 537.

§ 767. Exceptions From Operation of Chapter.

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone. Mar. 30, 1920, c. 111, § 7, 41 Stat. 538.

Pertinent Portions of Rule 15(c) of the Federal Rules of Civil Procedure.

Rule 15. Amended and Supplemental Pleadings.

* * * * * * * * *

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States or an agency or officer who would have been a proper defendant if named, satisfies

the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor. As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.

SUPREME COURT, U. S.

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FILED
OCT 17 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969
No. 635

ELIZABETH ELAINE CRAIG, *et al.*,

Petitioner,

vs.

THE UNITED STATES OF AMERICA, *et al.*,

Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari.

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IN THE

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ELIZABETH ELAINE CRAIG, *et al.*,

Petitioner,

vs.

THE UNITED STATES OF AMERICA, *et al.*,

Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari.

Respondent prays that the Petition for Writ of Certiorari be denied.

Opinions Below.

The opinions of the District Court for the Southern District of California and of the Ninth Circuit Court of Appeals are set forth in the Appendix hereto.

Questions Presented.

1. Is Rule 15(c) of the Federal Rules of Civil Procedure applicable in admiralty actions?
2. Did Petitioner comply with Rule 15(c) and is compliance necessary?
3. Did the District Court abuse its discretion in not permitting amendment of the Libel?

Statement.

The Statement of Petitioner as set forth in her Petition is adopted except as set forth hereinafter.

Jurisdiction in the District Court was based upon the Death on the High Seas Act, Title 46 U.S.C., Sections 761 to 768. The statute of limitations under the Act is two years from the date of the wrongful act. 46 U.S.C. Section 763. Respondent Litton Systems, Inc. was not named as a defendant in the action. [R. p. 2.]

The statute of limitations ran August 19, 1965. Respondent was not served until February 28, 1966, this being more than six months after the running of the statute. It was served as "Doe I." The District Court found that Respondent had not received any notice of the institution of the action within the statutory period. [R. p. 93.] That Court consequently held that plaintiff had failed to satisfy the requirements of Rule 15(c), Federal Rules of Civil Procedure, so as to cause the proposed amendment to relate back to the time of filing the original Libel and thus avoid the effect of the statute of limitations. [R. pp. 91-93.]

On appeal the Court of Appeals affirmed.

It held that the timeliness of the proposed amendment was controlled by Rule 15(c)(2). Making note of the finding of the District Court of the lack of notice to Respondent, the Court ruled that as against Respondent, the statute of limitations acted as a bar. Contrary to the argument of Petitioner, it held that notice of the "incident" from which the action arose, received within

the statutory period, did not satisfy the requirements of the Rule, but rather that notice of the *action* was necessary. It further found that the provisions of subdivision (3) of the Rule had not been satisfied because that condition is also premised upon notice of the "action" prior to the running of the statute.

In passing, the Circuit Court also commented upon the propriety of the use of fictitious defendants in actions based on a Federal law as in this case. It expressed its disapproval of the practice. As seen above, neither approval nor disapproval was necessary in making a decision in this action because the requirements of Rule 15(c) had not been satisfied.

ARGUMENT.

It is patent that the proposed amendment seeks to change the name of "Doe I" to the name of Respondent.

Necessarily, then, the provisions of Rule 15(c) are called into play since, in order to obviate the effect of the statute of limitations, "relation back" is critical. As stated in that Rule, the amendment will relate back if the party ". . . (1) has received such *notice* of the institution of *the action* (within the period of the statute of limitations) . . . *and* (2) *knew* or *should have known* that, but for a *mistake* concerning the identity of the proper party, the action would have been brought against him." (emphasis provided).

The Rule, as amended effective July 1, 1966, was controlling as to the motion to amend filed November 16, 1966. [R. p. 32.] Further, the adoption of the amendment has been seen as simply codifying pre-existing case law. *Cone v. Shunka* (1966 W.D. Wisc.), 40 F.R.D. 12; *United States v. Western Cas. and Surety Co.* (1966, 6 C.A.), 359 F. 2d 521. Petitioner expressly sought to amend pursuant to the rule as amended. [R. p. 36.] The Rule applies not only to the *changing* of a party but to *adding* a party as well. *Hoffman v. Halden* (1959, 9 C.A.), 268 F. 2d 280.

Rule 1 of the Federal Rules of Civil Procedure expressly makes the Rules applicable to "All suits . . . in admiralty . . .". The exceptions of Rule 81(a)(1) are not applicable.

Petitioner does not contend that Respondent received notice within the statutory period.

Petitioner contends, however, that the Rule should be relaxed in admiralty because of the "traditional lib-

erality" in such matters. But in permitting amendments to pleadings, the policy of "extreme liberality" has applied to *all* cases governed by the Federal Rules of Civil Procedure. *Kerner v. Rackmill* (M.D. Pa. 1953), 111 F. Supp. 150, 151. In this area of inquiry, admiralty is no sacred animal.

The District Court exercised its discretion in refusing to permit the amendment. Permitting or denying amendments, in admiralty as well as other causes, is a subject wholly within the discretion of the trial Court and a ruling there will be disturbed only upon a showing of abuse of discretion. *Hancock Oil Co. v. Universal Oil Products Co.* (1941, 9 C.A.), 120 F.2d 959; 2 *Benedict on Admiralty* (6th Ed. 1940), Section 355, pp. 559-560. Having shown no investigation by defendant concerning pilot Craig's accident until two and one-half years after the accident, Petitioner cannot reasonably contend that discretion was abused.

Because of the finding of non-compliance with Rule 15(c), the question of the propriety of fictitious defendants in an admiralty case is superfluous in the matter at hand. Regardless, there is substantial authority opposed to this practice. *Tolefree v. Ritz* (9 C.A.), 382 F. 2d 566, 567; *Sigurdson v. Del Guercio* (1956, 9 C.A.), 241 F. 2d 480. These are not "diversity" cases, but are actions founded upon a Federal law as is the case at bar. Contrary to Petitioner's contention that one must "forum shop," it is submitted that *Phillips v. The United States* (1955 N.D. Cal. So. Div.), 127 F. Supp. 12, would probably have provided little assistance to her, had that case been appealed to the Ninth Circuit Court of Appeals in the light of its subsequent rulings.

It is also respectfully submitted that Petitioner should not consider herself victimized by filing the action in a Federal Court rather than in the State Court in California, which permits the use of fictitious defendants. The statutes of limitation governing actions based on laws of the United States are liberal as compared to California law. Compare the Jones Act and the F.E.L.A. (three years) *Engel v. Davenport,* 46 S. Ct. 410, 270 U.S. 33, 70 L. Ed. 813; 45 U.S.C. Section 56 (respectively), the Tort Claims Act (two years) 28 U.S.C. Section 2401(b) as against California Code of Civil Procedure, Section 340.3 (one year). At no place in the record does Petitioner show cause for her lack of diligence in not utilizing discovery procedures to identify the parties she seeks now to sue.

It is respectfully submitted that the statute of limitations and the conditions imposed by Rule 15(c) are designed for the proper protection of unwary defendants. The Circuit Court properly applied these rules.

Conclusion.

No conflict of decision among Circuit Courts is shown. The reasoning of the Court below is sound. It is, therefore, respectfully submitted that this case is not a proper one for review by certiorari in this Court and that the Petition for a Writ of Certiorari should be denied.

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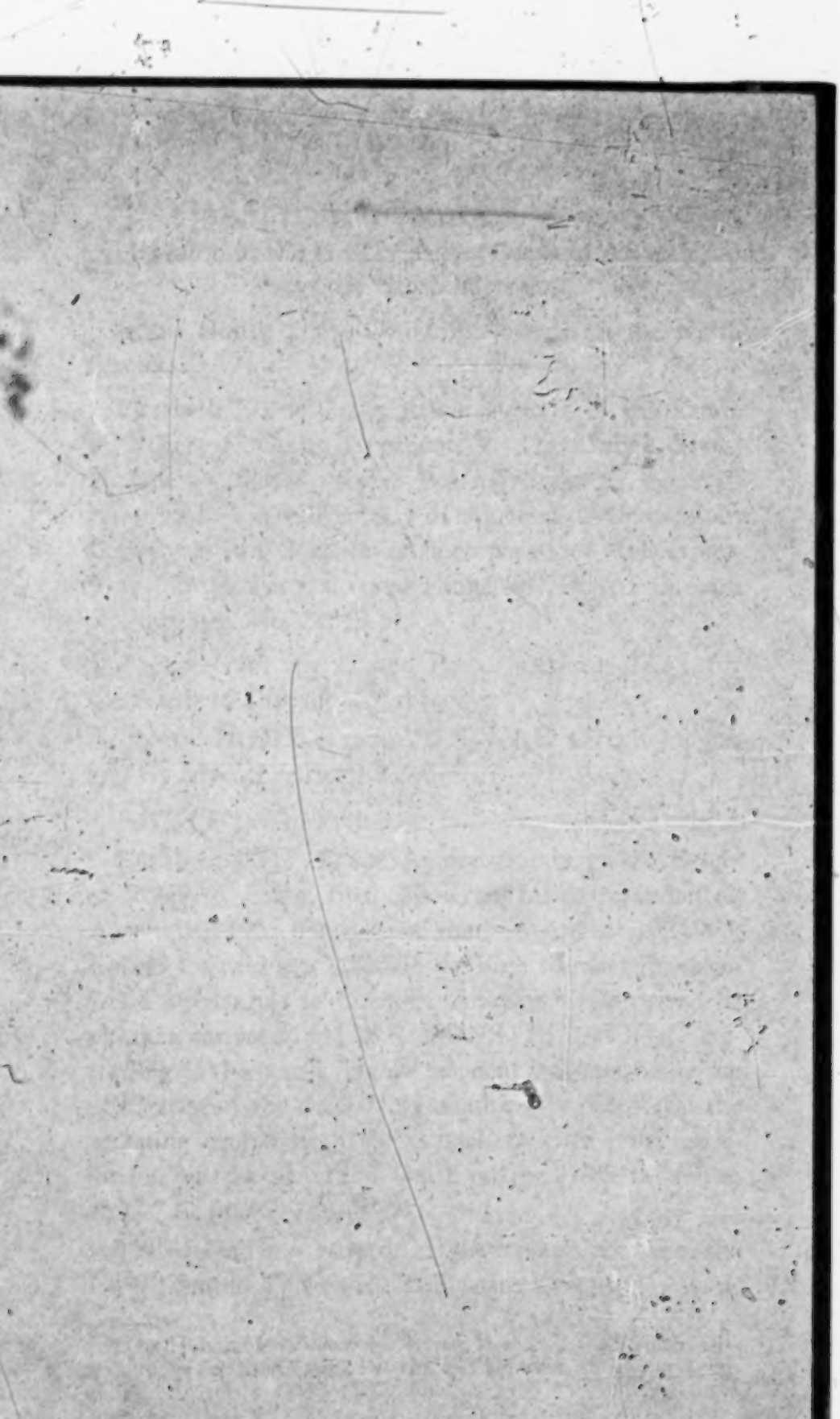

APPENDIX.

Opinion of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit.

Elizabeth Elaine Craig, Administratrix of the Estate of Robert J. Craig, Appellant, v. The United States of America, Timken Roller Bearing Company, a corporation; Aluminum Company of America, a corporation; Bethlehem Steel Corporation, a corporation; McKiernan-Terry Corporation, a corporation; and Does I through X, Appellees. No. 22319.

Appeal from the United States District Court for the Southern District of California.

Before: HAMELY and DUNIWAY, Circuit Judges, and BYRNE, District Judge*

HAMLEY, Circuit Judge:

Elizabeth Elaine Craig, Administratrix of the Estate of Robert J. Craig, filed this wrongful death action on August 16, 1965. She alleged that, on August 19, 1963, Robert J. Craig was killed on the high seas off Okinawa while attempting to land his military airplane on the aircraft carrier the U.S.S. CONSTELLATION. According to the complaint, the accident was caused by the negligence of the defendants resulting in defects in the arresting equipment of the vessel. District court jurisdiction was based on the Death on the High Seas Act, 46 U.S.C. §§ 761-768 (1964).

The defendants named in the complaint were the United States, Timken Roller Bearing Company, Alumi-

*The Honorable William M. Byrne, Senior United States District Judge for the Central District of California, sitting by designation.

num Company of America, Bethlehem Steel Corporation, McKiernan-Terry Corporation, and "Does I through X." Plaintiff caused service of an alias citation and a copy of the complaint to be made upon Litton Systems, Inc. (Litton) as "Doe I," on February 28, 1966. Litton appeared specially, contending that the alias citation was issued prematurely and that Litton had not properly been brought before the court.

The court ordered plaintiff to serve and file a motion for leave to amend the complaint to place Litton before the court, postponing argument on Litton's exceptions until argument was had on the motion to amend. The motion was thereafter filed and served. Following argument on the motion and exceptions, the court denied plaintiff's motion to amend the complaint by naming Litton in substitution of "Doe I." Plaintiff appeals.

The limitations period for actions filed under the Death on the High Seas Act is two years from the date of the wrongful act. 46 U.S.C. § 763. Accordingly, the statute of limitations had run with regard to this action by August 19, 1965. As indicated above, the alias citation and a copy of the complaint were served upon Litton on February 23, 1966.

The district court held that the two-year statute of limitations bars plaintiff's claim against Litton unless, applying the principles stated in Rule 15(c), Federal Rules of Civil Procedure, the proposed amendment of the complaint, adding Litton as an additional party, relates back to the date of the original complaint. The district court further held that, applying those principles to the circumstances of the case, plaintiff's proposed amended complaint did not relate back.

Plaintiff argues that, regardless of Rule 15(c), if an action is timely with respect to a fictitiously-named defendant, it is not barred as to an actual defendant named in lieu of the fictitious defendant in an amended complaint filed after the statute has run.

There is no provision in the federal statutes or Federal Rules of Civil Procedure either authorizing or expressly prohibiting the use of fictitious parties. However, this court has at least twice expressed disapproval of the practice. In *Tolefree v. Ritz,* 9 Cir., 382 F.2d 566, 567, a civil rights action, we held that it was proper to dismiss the action as to fictitious defendants. In *Sigurdson v. Del Guercio,* 9 Cir., 241 F.2d 480, an action for a declaratory judgment and to enjoin certain action by immigration officers, this court said:

> "These John Doe complaints are dangerous at any time. It is inviting disaster to allow them to be filed and to allow fictitious persons to remain defendants if the complaint is still of record. Appropriate action has been taken by the trial court on its own motion in some such cases. Although the fact that the Rules of Civil Procedure, 28 U.S.C.A., contain no express prohibition upon the subject, there is no authority of which we are aware for the joining of fictitious defendants, in an action under a federal statute. These defendants should have been eliminated by motion of Del Guercio. . . ." (241 F.2d at 482, footnote omitted)[1]

[1]In diversity actions the difficulties encountered when fictitious parties are named have been dealt with a number of times. See *Sykes v. United States,* 9 Cir., 290 F.2d 555, 556; *Grigg v. Southern Pacific Co.,* 9 Cir., 246 F.2d 6613, 620; *Molnar v. N.B.C.,* 9 Cir., 231 F.2d 684, 687; *Roth v. Davis,* 9 Cir., 231 F. 2d 681, 683.

This is an action in admiralty, and one district court has expressed approval of the practice of naming fictitious defendants in an admiralty suit, in view of the traditional liberality as to pleadings in admiralty. *Phillips v. United States,* N.D. Cal., 127 F.Supp. 912. On the other hand, this court has expressed doubt concerning the practice even in admiralty suits. See *California Stevedore & Ballast Co. v. Pan-Atlantic S.S. Corp.,* 91 F.2d 252, 253.

The only purpose the naming of fictitious defendants could possibly serve is to make it possible to substitute named defendants after the statute of limitations has run. But Rule 15(c), Federal Rules of Civil Procedure, provides the only way in which defendants, not accurately named in a pleading before the limitation period has run, may be accurately named afterwards. That rule, which pertains to the relation back of the pleadings, makes no mention of the pleading of fictitious parties. It is therefore wholly immaterial, insofar as the application of that rule is concerned, whether fictitious defendants were named prior to the running of the statute.[2]

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[2]While there are some kinds of civil proceedings in which the Federal Rules of Civil Procedure do not apply, the rules do apply in suits in admiralty with exceptions not here relevant. See Rules 1 and 81(a)(1), Federal Rules of Civil Procedure, as amended in 1966.

This action was commenced on August 16, 1965, prior to the effective date of amended Rule 15(c). The order of the Supreme Court, dated February 28, 1966, promulgating the 1966 amendments of the Federal Rules of Civil Procedure, provides that the amended rules shall govern all further proceedings in actions pending on the effective date of the amended rules ". . . except to the extent that in the opinion of the court their application in a particular action then pending would not be feasible or would work injustice, in which event the former procedure applies." The Supreme Court order is quoted in 28 U.S.C.A., Rules 59 to End, Cum.Ann. Pocket Part, page 231, following Rule 86. In our opinion, the application of the amended form of that rule

It may be, although this is not entirely clear, that plaintiff is also arguing that under Rule 15(c) and apart from the naming of fictitous defendants in the original complaint, the amended complaint naming Litton for the first time relates back to the date of the original pleading.

Under Rule 15(c), an amended complaint "changing" the party against whom a claim is asserted relates back to the date of the original pleading only if all three of the following conditions are met: (1) the claim asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading; (2) within the period provided by law for commencing the action against him, the party to be brought in by amendment has received such "notice of the institution of the action" that he will not be prejudiced in maintaining his defense on the merits, and (3) within the period provided by law for commencing the action against him, the party to be brought in knew or should have known that, but for a mistake concerning the identity of the proper party the action would have been brought against him.[8]

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is feasible and would not work an injustice in this case. Neither party here questions the applicability of Rule 15(c) as amended in 1966, and in fact, plaintiff relies upon the amended form of this rule in her argument on this appeal.

[8]For present purposes we assume, but we do not decide, that the naming of a new defendant in addition to and not in lieu of another defendant misnamed in the original complaint, constitutes the "changing" of the party within the naming of Rule 15(c). Compare *United States v. Western Casualty & Surety Co.*, 6 Cir., 359 F.2d 521, 523; *Storey v. Garrett Corp.*, N.D. Cal., 43 F.R.D. 301; and *King v. Udall*, D.D.C., 266 F.Supp. 747, 749; with *Williams v. United States*, 5 Cir., 405 F.2d 234, 237; *Travelers Insurance Co. v. Brown*, 5 Cir., 338 F.2d 229, 234; and *Meredith v. United Air Lines*, S.D. Cal., 41 F.R.D. 34, 39. See also, *Rural Fire Protection Co. v. Hepp*, 9 Cir., 366 F.2d 355, 362.

The district court held that Litton did not receive such notice of the institution of this action, prior to the running of the statute of limitations, as to enable it to maintain its defense without prejudice, and that therefore the second of the above-stated conditions of Rule 15(c) had not been met. On this ground, the court denied the motion to amend the complaint to name Litton as an additional party.

The facts concerning Litton's notice of the institution of this action are not in dispute. A seaman who was injured in the same accident in which pilot Craig was killed brought an action for damages within the statutory period against Litton and others in the United States District Court for the Southern District of New York. The action was entitled *Sevits v. McKiernan-Terry Corporation, et al.*, 65 Civ. 1804. Prior to the running of the statute, Litton investigated the facts relevant to that lawsuit.

However, while the instant action, involving the death of a pilot in the same accident, was instituted prior to the running of the statute, there is nothing in the record to show that Litton knew or had reason to know of this lawsuit before the statutory period had run. The notes of the Advisory Committee following the 1966 amendment of Rule 15(c), state that notices of the institution of the action "need not be formal," but here Litton received no notice, formal and informal, of the institution of the action.

It follows that if the words of the second condition of Rule 15(c), "notice of the institution of the action," mean notice, within the statutory period, of the filing of the lawsuit, that condition was not fulfilled apart from the "prejudice" factor. It would also follow that the third condition was not fulfilled because that con-

dition is also premised upon notice of the "action" prior to the running of the statute.

Plaintiff argues, in effect, however, that "action" as used in Rule 15(c) means incident giving rise to the action and that since Litton knew of the incident before the statute had run, the second and third conditions were fulfilled.

In our opinion, "action," as used in Rule 15(c), means a lawsuit, and not the incident giving rise to a lawsuit. The relevant words are "notice of the institution of the action." A lawsuit is instituted; an incident is not.

Moreover, even if the rule means notice of the incident rather than notice of the institution of the action, there was a failure to fulfill the further requirement of the second condition that the notice be such that the new defendant "will not be prejudiced in maintaining his defense on the merits."

While Litton had, prior to the running of the statute, investigated the factual issues relevant to seaman Sevits' suit, it was not shown to have investigated additional factual issues relating primarily to the suit now before us. In our suit the decedent was the pilot of the airplane. He crashed into the sea while attempting to land on the aircraft carrier. Therefore, as to this suit, the facts pertaining to the pilot's acts and omissions at the time of the accident have a direct bearing upon the amount of recovery, whereas they may have only incidental relevance in seaman Sevits' suit.[4] Under these

[4]Contributory negligence is an issue in a case based on the Death on the High Seas Act. While it does not bar recovery, the degree of negligence attributable to the decedent is to be taken into consideration in fixing the amount of recovery. See 46 U.S.C. § 766 (1964).

circumstances it cannot be said that notice of the incident, but not of the institution of this action, within the statutory period, did not prejudice Litton in maintaining its defense to the action.

We therefore hold that the district court did not err in denying the motion for leave to amend the complaint to add Litton as an additional defendant.

Affirmed.

Memorandum of Decision Denying Libellant's Motion to Amend Her Complaint by Adding Litton Systems, Inc. as a Party Respondent.

United States District Court, Southern District of California.

Elizabeth Elane Craig, Administratrix of the Estate of Robert J. Craig, deceased, Libellant, vs. The United States of America; Timkin Rollerbearing Company, a corporation; Aluminum Company of America, a corporation; Bethlehem Steel Corporation, a corporation; McKiernan-Terry Corporation, a corporation; and Does I through X, Respondents. In Admiralty No. 3371-SD-C.

On August 16, 1965 Libellant filed her libel based on the Death on the High Seas Act, 46 U.S.C.A. 761-768. The caption named several respondents including Does I through X. The transaction giving rise to the libel occurred on August 19, 1963 on a certain aircraft carrier being operated on the high seas near the Island of Okinawa. Libellant's husband was killed when an airplane he was piloting crashed into the sea after an attempted landing on the aircraft carrier.

On November 16, 1966 Libellant filed a motion to add Litton Systems, Inc. as a respondent in the action as of February 28, 1966, the date Litton Systems, Inc. was served with a copy of the libel. The motion was made pursuant to Rule 15 of the Federal Rules of Civil Procedure.

Rule 15 provides, in part, in subsection (c): "An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for

commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him."

The statute of limitations for actions brought under the Death on the High Seas Act is two years. 46 U.S.C.A. 763. In this case, the statute began to run on August 19, 1963.

There are two questions presented on the motion:

(1) Whether the use of fictitious defendants is proper in admiralty.

(2) If the use of fictitious defendants is proper, may plaintiff amend her complaint to "add" Litton Systems, Inc. as a respondent in the action and have the amendment relate back to the date the complaint was filed under Rule 15(c) of the Federal Rules of Civil Procedure?

Although there is no federal statute authorizing the use of fictitious "Doe" defendants in the federal court, there is some scant case authority supporting the proposition that the use of "Doe" defendants is proper in admiralty. *Phillips v. U.S.*, 127 F.Supp. 912 (N.D. Cal. 1955).

However, in order to amend the complaint and have the amendment relate back to the time the complaint was filed thereby defeating the statute of limitations in 46 U.S.C.A. 763, the Libellant must satisfy the requirements of Rule 15(c), F.R.Civ.P. Specifically, Libellant must show that the party to be added in the action has "received such notice of the institution of the

action that he will not be prejudiced in maintaining his defense on the merits, . . ." Furthermore, the notice of the action must have been received by the party sought to be added, within the period provided by law for commencing the action against him. It has not been contended by Libellant that Litton Systems did receive such notice of the institution of the action.

However, Libellant has argued that the party sought to be brought in need only know of the "occurrence" which gave rise to the cause of action in order for the amendment to the libel to relate back to the time of filing under Rule 15(c), F.R.Civ.P. In support of that proposition, Libellant relies on four cases. *Kelcey v. Tankers Company,* 217 F.2d 541 (2d Cir. 1954); *Overfield v. Pennroad Corp.,* 39 F.Supp. 482 (E.D. Pa. 1941); *Taormina Corporation v. Escobedo,* 254 F.2d 171 (5th Cir. 1968); and *Hartford Accident and Indemnity Co. v. Interstate Equipment Corp.,* 81 F.Supp. 357 (D.C.N.J. 1948). None of these cases support Libellant's position. In *Kelcey* and *Overfield,* the amendments brought in no new defendants. In *Taormina* and *Hartford Accident,* all defendants brought in by amendment had notice of the institution of the action within the period provided by law for commencing the action against them.

Assuming Litton Systems Inc. did know of the occurrence, it still had a right to rely on the two year statute of limitations in 46 U.S.C.A. 763. It is one thing to know of an occurrence which may give rise to a lawsuit, another to know you are being sued. Libellant has failed to carry its burden of showing that Litton Systems, Inc. had notice of the institution of the action within the period provided by law for commencing the

action against it. Consequently, the motion seeking to add Litton Systems, Inc. as a respondent by amending the complaint must be denied.

SO ORDERED.

JAMES M. CARTER
Judge

5-31-67

Rule 1, Federal Rules of Civil Procedure.

Rule 1. Scope of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action. As amended Feb. 28, 1966, eff. July 1, 1966.

Rule 81(a) (1), Federal Rules of Civil Procedure.

Rule 81. Applicability in General

(a) To What Proceedings Applicable.

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10, U.S.C. §§ 7651-7681. They do not apply to proceedings in bankruptcy or proceedings in copyright under Title 17, U.S.C., except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to mental health proceedings in the United States District Court for the District of Columbia.

Pertinent Portion of the F.E.L.A., 45 U.S.C. Section 56.

§56. Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action.

. . .

Pertinent Portion of the Tort Claims Act, 28 U.S.C. Section 2401(b).

§ 2401. Time for commencing action against United States.

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(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented. As amended July 18, 1966, Pub. L. 89-506, § 7, 80 Stat. 307.

California Code of Civil Procedure, Section 340.3.

§340. One Year—Penalty, Forfeiture, Bail, Torts, and Escapes.—Within one year:

. . .

3. An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another, or by a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized endorsement, [3] or against any person who boards or feeds an animal or fowl or who engages in the practice of veterinary medicine as defined in Business and Professions Code Section 4826, for such person's neglect resulting in injury or death to an animal or fowl in the course of boarding or feeding such animal or fowl or in the course of the practice of veterinary medicine on such animal or fowl; . . .

Pertinent Portions of 46 U.S.C.A. Sections 761-768.

§ 761. Right of Action; Where and by Whom Brought.

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued. Mar. 30, 1920, c. 111, § 1, 41 Stat. 537.

§ 762. Amount and Apportionment of Recovery.

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought. Mar. 30, 1920, c. 111, § 2, 41 Stat. 537.

§ 763. Limitations.

Suit shall be begun within two years from the date of such wrongful act, neglect, or default, unless during that period there has not been reasonable opportunity for securing jurisdiction of the vessel, person, or corporation sought to be charged; but after the expiration of such period of two years the right of action hereby given shall not be deemed to have lapsed until ninety

days after a reasonable opportunity to secure jurisdiction has offered. Mar. 30, 1920, c. 111, § 3, 41 Stat. 537.

§ 764. Rights of Action Given by Laws of Foreign Countries.

Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding. Mar. 30, 1920, c. 111, § 4, 41 Stat. 537.

§ 765. Death of Plaintiff Pending Action.

If a person dies as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this title during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this title. Mar. 30, 1920, c. 111, § 5, 41 Stat. 537.

§ 766. Contributory Negligence.

In suits under this chapter the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly. Mar. 30, 1920, c. 111, § 6, 41 Stat. 537.

§ 767. Exceptions From Operation of Chapter.

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone. Mar. 30, 1920, c. 111, §7, 41 Stat. 538.

Pertinent Portions of Rule 15(c) of the Federal Rules of Civil Procedure.

Rule 15. Amended and Supplemental Pleadings.

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(c) Relation Back to Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with

respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor. As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.